IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 107 of 1997
with
SPECIAL CIVIL APPLICATION NO. 3595 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Labour Courts and Industrial Tribunals ? : @

GUJARAT HOUSING BOARD
Versus
SANJAY B SHAH

Appearance:
MR HS MUNSHAW for Gujarat Housing Board
MR SHAILESH C PARIKH for workman Sanjay B. Shah

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/05/2002

ORAL JUDGEMENT

While bearing injustice from each corner of the society, the mental process and situation of the poor person has been rightly discussed as under:

Kismatka Hai Nam Magar Yeh
Kam Hai Diniyawalon Ka;
Fook Diya Hai Chaman Hamare
Khwabon Aur Khayalon Ka;
Jee Karta Hai Khudhi Ghot De
Apne Armanon Ka Gala;
Dekhke Duniyaki Diwali
Dil Mera Chupchap Jala.

In case of Balbir Kaur and Another and Steel Authority of India Ltd. and Others, reported in 2000-II-LLJ, page 1, the apex court has made the following observations in para 9 at page 6 of the report:

"9. As a matter of fact, the Constitutional philosophy should be allowed to become a part of every man's life in this country and then only the Constitution can reach everyone and the ideals of the Constitution framers would be achieved since the people would be nearer the goal set by the Constitution an ideal situation but a far cry for presently."

In case of Peerless General Finance and Investment Co. Ltd. versus Reserve Bank of India, reported in AIR 1992 SC 1033, the apex court has observed as under:

"The court has to maintain delicate balance between the public interest envisaged in the impugned provision and the individual's right; taking into account, the nature of his right said to be infringed; the underlying purpose of the impugned restriction; the extent and urgency of the evil sought to be remedied thereby; the disproportion of the restriction imposed, the prevailing conditions at the time, the surrounding circumstances; the larger public interest which the law seeks to achieve and all other relevant factors germane for the purpose. All these factors should enter into the zone of consideration to find the reasonableness of the impugned restriction. The court weighs in each case which of the two conflicting public or private interest demands greater protection and if it finds that the restriction imposed is appropriate, fair and reasonable, it would uphold the restriction. The court would not uphold a restriction which is not germane to achieve the purpose of the statute or is arbitrary or out of

its limits."

Heard learned advocate Mr. Munshaw and Mr. Shailesh C. Parikh. Special Civil Application No. 107 of 1997 has been filed by the petitioner Gujarat Housing Board challenging award made by the labour court in Reference No. 190 of 1992 dated 7th March, 1996 wherein the labour court has ordered for reinstatement of the workman with continuity of service without back wages. Special Civil Application No. 3595 of 1997 has been filed by the workman Sanjay B. Shah challenging the very same award wherein the labour court has denied back wages while making the award of his reinstatement with continuity of service. Special Civil Application No. 107 of 1997 filed by the Board has been admitted by this Court by issuing rule thereon by order dated 16.1.1997 and by way of ad.interim relief, impugned order made by the labour court has been stayed. Said ad.interim order has been subsequently confirmed by this court by order dated 2.9.1997. Special Civil Application No. 3595 of 1997 filed by the workman has been admitted by this court by issuing rule thereon by order dated 2nd December, 1997.

Learned advocate Mr. Munshaw for the Board has submitted that the labour court has committed gross error in making an award of reinstatement in favour of a workman who has worked only for a period of seven months with the Board and has not completed 240 days and therefore, no question of compliance of section 25-F of the Industrial Disputes Act, 1947. He has submitted that the labour court has also committed an error in coming to the conclusion that the Board has committed breach of provisions of section 25-G and H of the Industrial Disputes Act, 1947. According to his submission, as regards the contention that the new employees have been recruited after the retrenchment of the workman, no proof has been produced by the workman before the labour court and in view of that, the labour court ought not to have concluded that there was breach of section 25-H of the Act by the Board. He has submitted that the industrial dispute was raised on 4th September, 1991 and thereafter, the workman was earning while working in the Hipolin and, therefore, the labour court was right in refusing back wages. Mr. Munshaw has further submitted that the labour court has committed an error in relying upon the evidence of the workman wherein he has deposed and has given names of 6 to 7 persons as they were given work and were recruited as a clerk. He has submitted that the labour court ought to have appreciated the difference

between the daily wager and regular employee. He has submitted that the provisions of section 25H would apply only in case of daily wager workman and not in case of regular employee. The substance of his submission is that the said persons were appointed and recruited by the Board in the year 1991 as a regular employees on the post of clerk after following regular selection procedure as per recruitment rules and, therefore, in such a situation, section 25-H would not apply. He has submitted that this aspect was narrated by the Board in its written statement filed before the labour court in para 7 wherein it has been denied that the Board has recruited new persons on the post of clerk in December, 1989 and May, 1990 as alleged or otherwise and has submitted that the board has not violated sec. 25G and F of the ID Act and has further clarified as per the averments made on page 9 ground (xii) of the petition that the last recruitment in the cadre of junior clerk made by the petitioner was in the year 1991 and thereafter, no recruitment has been made pursuant to the Government Resolution dated 28th December, 1991 and has further submitted that in fact, in all, six persons referred to by the workman are employed by the Board after following due process of recruitment rules and regulations of the Board and, as such, there was no breach of the provisions of section 25-G or H of the Industrial Disputes Act and in view of this, the labour court ought not to have come to the conclusion that there was breach of section 25G and H of the Industrial Disputes Act, 1947. Mr. Munshaw has, thus, made an attempt to draw distinction between the appointment of a person as daily wager clerk and appointment of a clerk on regular basis and submits that said persons were appointed as a clerk on regular basis, there was no breach of section 25-H of the Act and, therefore, the labour court has erred in recording finding that there was breach of section 25H of the Act.

On the other hand, learned advocate Mr. Parikh appearing for the workman concerned has submitted that in view of the apparent breach of section 25-G and H of the Industrial Disputes Act, the labour court was right in making the award of reinstatement in favour of the workman. Therefore, according to him, that part of the award does not require any interference by this Court in exercise of the powers under Article 226 and/or 227 of the Constitution of India. He has further submitted that the labour court has committed an error in not granting back wages while making award of reinstatement. According to him, in view of the delay in raising an industrial dispute, the labour court ought to have denied

back wages for that part and ought to have considered the aspect of back wages from the date of raising an industrial dispute and ought to have granted back wages in favour of the workman. He as further submitted that before the labour court, it was admitted by the workman during the course of recording of his oral evidence that he has been employed in Hipolin and has been earning something. He has submitted that in view of that, the labour court ought to have awarded some back wages by directing to make adjustment of the earning out of the wages received by him by working in Hipolin or ought to have granted 50 per cent of the back wages for the interim period.

I have considered the submissions made by both the learned advocates. I have also perused the award in question made by the labour court. Before entering into the merits of the matter, it is required to be noted that the workman has worked with the board for a period from 14th May, 1984 to 10th August, 1984 and from 1st November, 1985 to 28th February, 1986. This is the period during which he has worked for a period of about seven months and has not completed 240 days continuous service with the Board. The respondent workman has deposed before the labour court at Exh. 13 and has produced documentary evidence vide list Exh. 9 and in his oral evidence on oath before the labour court, the workman has deposed that after his appointment, other workmen namely Shri Jatin Barot, Jagruti Dalal, P.U.Parmar, M.J. Jadav, L.D. Mishra, V.B. Solanki, Mayur Vaghela etc. were recruited and the workman was retrenched on 28.2.86 and in December, 1989 and in May, 1990, recruitments were made but at the time of new recruitment, job was not offered to the second party. In his cross examination, the workman has deposed that the persons whose names were given by him have been engaged by the board on permanent basis. The labour court has observed that the board has not produced any evidence in rebuttal of such contention. Before the labour court, on behalf of the first party Board, witness Shri Mohamad Sharif Shaikh has been examined on oath at Exh. 17 wherein also, the names of the workmen given by the workman second party have not been challenged nor has he produced the muster roll before the court and has further deposed that the seven workmen whose names were given by the second party workman have been retained in service and have not been retrenched on 28.2.1986. In view of this evidence of the witness for the first party board, the labour court has come to the conclusion that in this manner, the first party board has not followed the rule of last come first go and in view of that, the labour

court has come to the conclusion that there is breach of the provisions of section 25-G of the I.D. Act, 1947 and as a result of it, the second party workman is entitled for being reinstated in service. The labour court has also come to the conclusion that after retrenchment of the second party workman, new workmen were recruited and, therefore, there was breach of section 25-H of the Industrial Disputes Act and in view of that also, the workman is entitled for being reinstated in service. Therefore, based upon these two conclusions, the labour court has made the award of reinstatement in service with continuity. As regards the attempt made by Mr. Munshaw to draw distinction between the appointment of a person as daily wager clerk and appointment of a clerk on regular basis and submits that said persons were appointed as a clerk on regular basis, there was no breach of section 25-H of the Act and, therefore, the labour court has erred in recording finding that there was breach of section 25H of the Act, it is necessary to refer to the provisions of section 25-H of the Industrial Disputes Act,1947. Section 25-H of the Industrial Disputes Act,1947 is reproduced as under:

"25-H. Re-employment of retrenched workmen.
Where any workmen are retrenched and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workmen] who offer themselves for re-employment shall have preference over other persons. "

Considering the provisions made under section 25-H of the ID Act, 1947, from the bare reading of section 25-H of the Act, it would appear that after retrenchment, if the employer wants to employ any person in the employment, then, he shall have to give an opportunity to the retrenched workman for re-employment and such retrenched workman shall have preference over the other persons by following section 25-H of the Industrial Disputes Act. In this case, admittedly, six persons were recruited subsequent to the appointment of the respondent on the post of clerk and admittedly when the services of the respondent were terminated, said six persons were continued in service whose services were subsequently confirmed and therefore, considering these facts, the Board has committed breach of section 25G of the Act.

The scheme of the Industrial Disputes Act, 1947

is that there must be an industry within the meaning of section 2(j) of the Act. There must be a workman as defined under section 2(s) and industrial dispute under section 2(k) between the employer and the employee. These are the compulsory elements which are required to be satisfied for the application of the Industrial Disputes Act, 1947. Each sections of the I.D. Act, 1947 are applicable to the workman as defined under the I.D. Act,1947. Therefore, section 2 (oo) of the I.D. Act, 1947 where the term 'retrenchment' has been defined means termination by an employer of services of the workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action and it does not include the voluntary retirement, superannuation, periodical appointments and the termination on the ground of continued ill health. Therefore, if the service of the workman has been terminated by the employer for any reason whatsoever and not included in any exception, then, such termination would amount to retrenchment. Now, in this case, if it is believed that the services of the respondent workman has been terminated by the petitioner by way of retrenchment within the meaning of section 2(oo) of the I.D.Act, 1947, then, section 25-G would apply. This section is also applicable to a workman as defined under the I.D. Act, 1947. According to the evidence of the respondent workman, when he was appointed as a daily wager clerk, other six persons whose names have been given in his deposition, they were recruited subsequent to the appointment of the respondent but they were continued in service at the time when the services of the respondent were terminated. Thus, while terminating the services of the respondent workman, the petitioner board has not followed the principle of last come first go which is violative of Article 14 of the Constitution of India. There was no agreement between the petitioner and the respondent workman and there is also no special reasons given by the petitioner for deviation from the ordinarily retrenching the workman who has come last in that category and special reasons have not been recorded for retrenching any other workman. For retaining six junior workmen and for terminating the services of the respondent workman, the petitioner has not given any special reasons and, therefore, there has been violation of section 25-G of the I.D. Act.

Considering the provisions of section 25H and 25G, both are violated by the petitioner. Mr. Munshaw has raised contention before this Court that the provisions of section 25H are not applicable to this case because the subsequent recruitment was made in the year 1991 after following the recruitment rules on regular

basis and, therefore, the respondent workman is not entitled to have preference in the matter of regular appointment, under sec.25H of the I.D. Act. From the record, it is clear that such contention has not been raised by the petitioner before the labour court. This aspect has been initially considered and examined by this Court while passing the order dated 2nd September, 1997 while confirming the ad.interim relief. The order dated 2nd September, 1997 is reproduced as under:

"Mr. Munshaw has argued that only time bound appointments were given to the respondent and he had not completed a period of 240 days in any of the two years during which he worked. It has also been argued that a dispute was raised in 1992 whereas the termination order was passed in 1986. So far as the grievance with regard to violation of sections 25G and 25H of the Industrial Disputes Act are concerned, it has been argued that the persons against whom such grievance is raised were not similarly situated persons because they had been appointed after following the procedure prescribed under the rules whereas the appointments of the respondent were not made in accordance with the recruitment rules. It is of course noticed that this plea was not raised before the labour court that six persons about whom the respondent is complaining is of violation of sections 25 G and 25 H have been appointed after following procedure prescribed under the Recruitment Rules. It is not disputed by Mr. Parikh that the respondent workman is gainfully employed of course he is getting less salary than what he would have drawn had he not been terminated. However, the fact remains that the respondent continues to be in gainful employment even today.

In the facts and circumstances of the case, ad.interim order dated 16.1.1997 is hereby confirmed to last till the disposal of this petition. The matter may be listed for final hearing in the month of November, 1997. "

Thus, upon perusal of the entire award made by the labour court and also considering the order dated 2nd September, 1997 quotted hereinabove, it is clear that no such contention has been raised by the petitioner before the labour court in the written statement filed before the labour court and, therefore, this court can ignore the contention which has been raised now before this

court for the first time. However, according to my opinion, once when the contention has been raised by the petitioner before this Court, then, this court must examine such question in accordance with law. It is not in dispute that the respondent has not completed 240 days continuous service but he has rendered in all, service of seven months with the petitioner and, therefore, section 25F is not applicable and in view of these admitted facts, Mr. Munshaw has submitted that since section 25F is not applicable to the facts, of this case, section 25G also would not apply. This aspect has been examined by Apex Court in case of Central Bank of India versus S. Satyam and others reported in JT 1996 (7) SC 181. Relevant head notes of the said decision are reproduced as under:

"....it is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for re-employment earlier than those placed lower because of a lesser period of service. In this manner a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for re-employment only if an eligible workman above him in the seniority list is not available. Application of section 25-H to the other retrenched workmen not covered by section 25F does not in any manner prejudice those covered by section 25F because the question of consideration of any retrenched workman not covered by section 25F would arise only if and when no retrenched workman covered by section 25F is available for re-employment.

The plain language of section 25-H speaks only of re-employment of retrenched workmen. The ordinary meaning of the expression 'retrenched workmen' must relate to the wide meaning of retrenchment given in section 2(oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words 'workmen..... who has been in continuous service for not less than one year. This section 25F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of further words 'workmen..... who has been in continuous service for not less than one year'. It is clear that section 25-F applies to the retrenchment of a workman who has been in continuous service for

not less than one year and not to any workman who has been in continuous service for less than one year and it does not restrict or curtail the meaning of retrenchment merely because the provisions therein is made only for the retrenchment of a workman who has been in continuous service for not less than one year. Chapter V-A deals with all retrenchments while section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principles for retrenchment and applies ordinarily the principles of 'last come first go' which is not confined only to workman who have been in continuous service for not less than one year, covered by section 25-F.

The next provision is section 25-H which is couched in wide language and is capable of application to all retrenched workmen, not merely those covered by Section 25-F.It does not require curtailment of the ordinary meaning of the word 'retrenchment' used therein. The provision for reemployment of retrenched workmen merely gives preference to a retrenched workman in the matter of re-employment over other persons. It is enacted for the benefit of the retrenched workmen and there is no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to the better placed retrenched workman.

Chapter V-A providing for retrenchment is not enacted only for the benefit of the workmen to whom section 25-F applies but for all cases of retrenchment and, therefore, there is no reason to restrict application of section 25 H therein only to one category of retrenched workmen We are, therefore, unable to accept the contention of Shri Pai that a restricted meaning should be given to the word retrenchment in section 25-H. This contention is, therefore, rejected.

The other submission of Shri Pai, however, merits acceptance. All the retrenched workmen involved in the present case were employed for short periods between 1974 to 1976. It was only in 1982 that a writ petition was filed by them to claim this benefit. The other persons employed in the industry during the intervening period of several years have not been

impleaded. Third party interests have arisen during the interregnum These third parties are also workmen employed in the industry during the intervening period of several years. Grant of relief to the writ petitioners (respondents herein) may result in displacement of those other workmen who have not been impleaded in these proceedings, if the respondents have any claim for re-employment The laches leading to the long delay after which the writ petition was filed in 1982 is sufficient to disentitle them to the grant of any relief in the writ petition. Moreover, there is not even a suggestion made or any material produced to show that on the construction, we have made of section 25H, the respondents would be entitled to get any relief in the highly belated writ petition after the lapse of several years by way of preference over any person employed during the intervening period. In our opinion, this alone was sufficient for the High Court to decline any relief to them. It was urged by learned counsel for the respondents that only a limited relief has been granted to the respondents which need not be disturbed. In our opinion, the lapse of a long period of several years prior to the filing of the writ petition is sufficient to decline any relief to the respondents. "

Therefore, in view of the decision of the apex court, section 25H is applicable to the retrenchment of the workman who has not completed 240 days continuous service and, therefore, in this case, section 25H is applicable. Scope of section 25H has been considered by this court in case of Gujarat State Machine Tools Corporation versus Deepak J.Desai, reported in 1987 Lab IC 1361. Para 3 and 4 of the said decision are reproduced as under:

"3. As far as the present case is concerned, the respondent worked from 12.10.1982 to 11.4.1983. Hence, there is absolutely no difficulty in applying the principles laid down in the aforesaid Supreme Court's decision to the facts of the case. From the definition of S. 2(oo) of the Industrial Disputes Act, as regards the retrenchment, we do not find anything in this definition to exclude the temporary worker from such a definition. Hence, the argument of Mr. Nanavati to the effect that this definition as it

stood at the time of discharge of the present respondent will not include temporary worker cannot be appreciated. Factually also, it cannot be said that the respondent was inducted into service against a temporary vacancy. If that be so, Section 25H will squarely apply to the present case. The argument to the effect that such a pleading has not been made by the workman in his statement cannot be made a ground to deny the workman the benefit of S. 25H of the Industrial Disputes Act. S. 25H reads as follows:

'Re-employment of retrenched workmen.-

Where any workmen are retrenched, and the employer proposes to take into his employ any person, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workmen who offer themselves for re-employment shall have preference over other persons.'

4. Mr.Nanavati, learned counsel for the appellant submitted that mere advertisement in the newspapers will not in any way offend section 25H, but on the other hand, it should be taken an invitation for the discharged workman to apply and get himself reinstated. We are not able to appreciate this argument. Section 25H is very clear to the effect that the workmen who are retrenched should be given an opportunity as prescribed by the rules before the Management recruits fresh hands for the same post. Rule 82 of the Gujarat Industrial Disputes Rules clearly envisages the method and manner in which such intimation has to be given to the discharged employee. In this case, R.82 (1)(b) will squarely apply. Hence failure to give registered notice which is admittedly not done in this case is fatal to the argument advanced by the Management as regards compliance of section 25H. Even on this aspect of the case, we are of the view that the Labour Court is correct in coming to the conclusion that there is violation of S.25H and on that ground also, the workman has to be reinstated in service. The Labour Court, after taking into consideration the gainful employment of the respondent somewhere has correctly denied the backwages. "

Even the Allahabad High court has also considered section 6(Q) of the UP ID Act, 1947 which are similar to the Industrial Disputes Act,1947 in the matter of British India Corporation versus Labour Court and others reported in 1978 Lab IC 523. The matter was relating to retrenchment of choukidars. At the time of reorganization of the business, appointment of new chowkidars were made without offering opportunity to retrenched workmen for re-employment. Para 5 of the said decision is reproduced as under:

"5. It is well settled that if an employer closes his business or if there is any re-organization scheme, or if there is paucity of work, it is open to the employers to retrench their workmen in accordance with the provisions contained in the Industrial Disputes Act, but retrenchment must be a bona fide one. It cannot be used as a camouflage to dispense with the services of the workmen who may otherwise be entitled to continue in service. In the instant case, the Labour Court has recorded a finding that even though the employers shifted their office from Sutherland House to the premises of Kanpur Woollen Mills, the respondents workmen did not cease to be in existence. The Labour Court referred to the evidence of the employers and recorded findings that after the retrenchment of the respondent workmen, new hands were recruited to do the work of Chaukidars and those newly recruited chaukidars were posted to keep watch over Sutherland House. These findings show that the work for which the respondent workmen were employed had not ceased due to reorganization of business. The Labour Court, therefore rightly held that the employers' plea that the services of the respondent workmen were retrenched bona fide would not be upheld. If the employers required fresh hands for carrying on the work of Chaukidars they should have offered employment to the respondent workmen as contemplated by Sec. 6-Q of the U.P. Industrial Disputes Act. Admittedly, the employers did not raise any plea before the Labour Court that they had offered opportunity to the respondent workmen for re-employment as Chaukidars. The employers, therefore, clearly failed to comply with the mandatory requirements of S. 6-Q of the Act."

Identical question has been examined by the Allahabad High Court recently in case of Oriental Bank of Commerce versus Union of India reported in 1998 II LLJ 112 where the services of the daily wager were terminated and in place of daily wager, regular recruitment under the service rules was made by the employer and it has been held by the Allahabad High Court that even in regular recruitment made by the employer without making offer to the concerned daily wager to compete with others in regular process, it amounts to denial of legal right under section 25H of the I.D. Act. The observations made by the Allahabad High Court in paragraph 7, 8 and 9 of the said decision are reproduced as under:

"7. I have considered the submission of the learned counsel for the parties. From a perusal of paragraphs 20.7 and 20.8 of the Bipartite Settlement of 1966, there is no doubt that Bank could engage temporary hands in circumstances mentioned in the aforesaid paragraph. However, their own document annexure 3 of the writ petition, which has been stated to be a policy adopted for making recruitments, provides certain norms. Para 1 whereof provides that as far as possible, temporary appointments should have to be avoided and in no case such appointment should be allowed in casual leave arrangement. No temporary appointment should, however, be made without approval of the Regional Heads in advance in case of appointment in clerical grade. Para 2 provides that the requisition of candidates for temporary appointments in clerical cadre should be made through respective Banking Service Recruitment Board. If the Banking Service Recruitment Board is not in a position to provide approved persons, the candidate should be requisitioned from the local Employment Exchange. If the Board as well as the Employment Exchanges wherever these exist, are not able to provide candidates, the branches may be allowed to make their own arrangement strictly according to the norms. Here there is nothing on the record from either side to show that the aforesaid norms were complied with. However, the tribunal has recorded a finding that the appointment of the concerned workmen was not against any leave vacancy. The petitioner could not adduce sufficient evidence to prove this fact. It has also been proved that after terminating the employment of respondent workmen again temporary hands were engaged ignoring their claim. The

relevant finding recorded by the Tribunal in para 12 may be reproduced here:

'However, it has been proved from the evidence of V.N.Sekhari and other witnesses that subsequent to termination of concerned workmen, new hands have been taken and no opportunity to the concerned workmen was given. Indeed this fact was not disputed on behalf of the management even during the course of arguments. In this way, it is held that when the new hands were recruited in place of concerned workmen they were not afforded opportunity. in this way, there has been breach of Section 25-H of the I.D. Act. In the case, it has been held that because of breach of Section 25-H of the I.D. Act, their termination would be void in law. It is held accordingly.'

8. In the facts and circumstances of the case, there remains no doubt that petitioner committed breach of Section 25-H of the Act which reads as under:

'Re-employment of retrenched workmen.'Re-employment of retrenched workmen. Where any workmen are retrenched, and the employer proposes to take into his employ any person, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workmen who offer themselves for re-employment shall have preference over other persons.'

Rule 77 of the Industrial Disputes (Central Rules, 1957 (hereinafter referred to as the Rules) creates an obligation on the employer to prepare a list of all workmen in the particular category from which retrenchment is contemplated. Rule 78 provides for reemployment of the retrenched workmen. The rule has a material bearing in the present case which is being reproduced below:

'78. Re-employment of retrenched

workmen. At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display of a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall also give intimation of these vacancies by registered post to every one of all the retrenched workmen eligible to be considered therefor, to the address given by him at the time of retrenchment or at any time thereafter.'

9. From a perusal of rule 78, it is clear that as it was a case of retrenchment, the petitioner was under a legal obligation to give notice to the respondent workmen days before the vacancies are to be filled to offer themselves for reemployment. Rule 78 does not create any distinction between temporary employment or permanent employment. If there was a case of retrenchment in both the cases, the petitioner was under obligation to give opportunity to the concerned workmen to offer himself for re-employment, and he was also entitled for a preference over others. However, this was subject to the test, if any, prescribed for such appointment. There is nothing on record to show that the petitioner bank discharged this legal obligation created by section 25H read with rule 78 before making fresh recruitment on the post either on temporary or permanent basis. In the circumstances, the breach of section 25H of the Act has been fully established and the workmen were entitled for the relief."

Therefore, considering the observations made in the aforesaid decisions, according to my opinion, as such, there is no difference or distinction made under section 25H of the I.D. Act, 1947 that after retrenchment of temporary workman or daily wager workman, if regular recruitment is made by the employer then section 25H is applicable. There is no such provision made under section 25H of the I.D. Act and no such condition has been incorporated under section 25H and therefore, provisions of section 25H would apply in both the cases and therefore, in case of retrenchment of a workman, if the employer would make recruitment of another daily wager, temporary, casual or permanent, whatever it may be, section 25H would apply and the

employer is required to comply with the same. It is the statutory obligation required to be discharged by the employer before making any type of recruitment in the establishment. IN the present case, the petitioner board has violated section 25H of the I.D. Act in not offering the employment to the respondent herein whose services were terminated earlier and has made recruitment on regular basis without first offering the respondent and therefore there has been violation of section 25H of the I.D. Act, 1947.

As regards the second contention raised by Mr. Munshaw that for the purpose of application of section 25F and G, one year continuous service is required to be established by the workman, the view taken by this court in case of Bharat Industries versus Khemiben Valjibhai & Others reported in 1995 (1) GLH (UJ) 6 is relevant. Relevant observations made by the Division Bench of this Court are reproduced as under:

"The Presiding Officer of the Labour Court has taken the view that so far as the applicability of Section 25G of the Industrial Disputes Act, 1947 is concerned, the workman who seeks relief for the breach of the said section, has not to prove that he has been in continuous service for not less than one year. We endorse the view expressed by the Presiding Officer. Section 25-G is an independent provision which prescribes the procedure for retrenchment under certain circumstances. It incorporates the principle "Last come first go". In the context of the provisions of the section, the concept of continuous service for not less then one year, which finds place in Section 25-G and 25-F, has no relevances; under the circumstances, the writ petition is summarily rejected."

Said aspect has also been examined by this court in case of Rajkot Municipal Corporation versus Kishor Govind reported in 1996 (1) GLH page 84. Relevant para 5, 6 and 8 of the said decision are reproduced as under:

"5. The Scheme envisages that the provisions of section 25-C to section 25-F applies only to the establishments mentioned in section 25-A and not to every industry generally falling under section 2(j) of the Act. However, Section 25-F, 25-G and 25-H are not hit by section 25-A. Therefore, the provisions of sections 25-B, 25-F,

25-G and 25-H of the Act are applicable to every establishment to which the provisions of the Industrial Disputes Act apply. Section 25-B merely defines what is meant by continuous service for the period for the purpose of Chapter V-A of the Act, that is to say, wherever the word 'continuous service' appear in any provisions under Chapter V-A, it has to be construed in Section 25-B. Section 25-F grants certain protection to those workmen against unceremonious termination of service who have been in continuous service for not less than one year. In such cases, where workman has completed continuous service for one year or more in terms of Section 25-B is given marching order, he has to be served with one month's notice in writing indicating reasons for retrenchment and in case such notice is not given, then, he has to be paid wages for the period of notice in lieu thereof. In addition thereto, the workman has to be paid retrenchment compensation at the time of retrenchment equivalent to 15 days average pay for each completed year of continuous service. Section 25-G provides that retrenchment should follow ordinarily, last come first go rule, that is to say, ordinarily, most person in the category of the workman who is sought to be retrenched must go before the senior is asked to go unless there are specific reasons for deviating from the rule and such reasons are to be recorded in writing. Section 25H is post retrenchment relief envisaged in the matter of reemployment where the employer proposes to take into employment any person after retrenchment he has to offer such employment first to the retrenched workman and such offer being made, the workman offers himself for re-employment, then, he shall have preference for re-employment.

6. On close scrutiny of sections 25-F, 25-G and 25-H of the Act, it becomes abundantly clear that though they are part of the same scheme, of providing against arbitrary retrenchment of workman by the management and to curb the tendency of hire and fire and also to provide for re-employment of such retrenched workman in case same employer again employs new person so that retrenchment simpliciter is not used as a tool merely to make room for somebody else by removing person whose services are otherwise required. Viewing in this light, it cannot be said that on

plain reading of the language of the provisions of the statute and also keeping in view the object of various provisions of Chapter V-A of the Act, that rule envisaged under section 25-G is also subject to same condition as are the provisions of section 25-F. It may be noticed that section 25-G necessarily has within it ingredients of Article 14 which provides equality as fundamental right guaranteed to the citizens and Article 16 which provides for equal opportunities in the matter of employment. Section 25-G is meant to guard against arbitrarily motivated retrenchment. The provision curbs the tendency of conferring favour on one employee by retaining his services while discharging the senior. Section 25-G does not refer to such workman falling under Section 25. Had section 25G to be dependent upon section 25-F for its operation, terminology used by the legislature would have been different. In that event, instead of the words 'any workman', the legislature would have used 'such workman'.

7. xxx xxx xxx

8. Having carefully gone through the aforesaid decision, I am of the opinion that the aforesaid observation, in no way, helps the contention of the petitioner. It was not a case in which the provisions of section 25-G were at all involved and considered. It was a case in which person whose services were terminated had not completed one year's continuous service and his case did not fall within the scope of section 25-F of the Act.The termination of the services of the workman was not held to be illegal for breach of section 25-G of the Act. Thereafter, when the question of giving appointment to fresh hands in the same establishment arose, whether benefit of section 25-H for giving preference to such persons can be extended or not was the only issue raised and decided that Section 25-H can only operate in case where that is valid retrenchment. Nowhere the Court stated nor the court was called upon to decide whether the termination which is thought not attracting section 25-G could be sustained, nor was it an issue before the Court nor the Court decided whether continuous service for a period of one year or more within the meaning of section 25-B, as is required for the purpose of Section 25-F,

is also necessary for the purpose of invoking the provisions of section 25-G. In my opinion, therefore, the aforesaid decision does not help the petitioner."

Thus, in view of the above discussion and from the bare reading of section 25-H of the Act, it would appear that after retrenchment, if the employer wants to employ any person, then, he shall have to give an opportunity to the retrenched workmen for re-employment and such retrenched person shall have preference over other persons by following section 25-H of the Act. In this case, admittedly, six persons were recruited subsequent to the appointment of the respondent in the post of clerk and admittedly when the services of the respondent was terminated, said six workmen were continued in service were confirmed subsequently and, therefore, considering these facts, the Board has committed breach of the provisions of section 25-G of the Act. There is no distinction as per section 25-H of the Act between recruitment of a person on regular basis and recruitment of a person on daily wage basis for the purpose of section 25-H of the Industrial Disputes Act, 1947.

In case of Government of N.C.T. of Delhi versus Balbir Singh and Others reported in 1997 II CLR 509, the Delhi High Court has taken the similar view. Head Notes of the said decision are reproduced as under:

" S. 25-H. Benefit of re-employment under section 25-H is couched in wide language and is capable of application to all retrenched workmen and not merely those covered by S. 25-F. Retrenched workmen not covered by S. 25-F are entitled to the benefit of re-employment under S.25-H. "

Therefore, there is no substance in the contention of Mr. Munshaw that they were not required to follow section 25-H of the Act since the persons recruited were recruited as a clerk on regular basis whereas the workman herein was working as daily rated clerk. Such submission made by Mr. Munshaw cannot, therefore, be accepted. Upon bare reading of the award in question, it is clear that the Gujarat Housing Board has committed breach of section 25-H of the Act and that has not been disputed by Mr. Munshaw but an attempt has been made by Mr. Munshaw that there was no necessity to

make offer to the workman herein in view of the appointment of persons on regular basis which submission has not been accepted by this court and, therefore, there is non compliance of section 25-H of the Industrial Disputes Act, 1947. Mr. Munshaw has submitted that section 25-H has to be followed only in case when recruitment of daily wager clerk has been made and in case of appointment of clerk on regular basis, it is not required to be followed. That contention of Mr. Munshaw cannot be accepted and therefore, it has been rejected since in section 25-H of the Act, no such difference and distinction has been mentioned by the Statute. As per the provisions of section 25-H, for any appointment of any person subsequent to the retrenchment of a workman, section 25-H is required to be followed.

The labour court has also considered another important aspect, looking to the oral evidence of the workman concerned at Exh. 13 that during his service, other seven employees were recruited by the Board and they were junior to the workman and yet, while terminating his services, said persons were continued in service. These averments made by the workman in his examination in chief were not controverted and nothing to the contrary has come out during his cross examination and even upon reading the oral evidence of the witness for the Gujarat Housing Board at Exh. 17, during the cross examination of the said witness for the Board, when the question was asked as to whether above referred persons namely Mayur D. Vaghela, Jagruti Dalal, P.U. Parmar etc. were again engaged or not, the witness has said that he has no knowledge. Thus, the witness for the Board has not been able to deny in his evidence that the said persons were not engaged and has not been able to falsify the say of the workman by producing any material before the labour court. Therefore, the labour court appreciated deposition of the workman concerned and the deposition of the witness for the Board at Exh. 17 and has thereafter come to the conclusion that there was non compliance of section 25-G of the Industrial Disputes Act. Section 25-G of the Act is reproduced as under:

> "25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for the

reasons to be recorded the employer retrenches any other workman."

Thus, procedure for retrenchment has been prescribed under section 25-G of the Act and upon appreciation of the evidence produced by the Board and the workman concerned before the labour court, the labour court has come to the conclusion that the provisions of section 25-G have not been followed and, therefore, in view of these findings, the labour court has made an award of reinstatement in favour of the workman. In making such an award, the labour court has not committed any irregularity and has also not committed any error.

Then the labour court has considered the aspect of back wages and has denied back wages for the whole period while making award of reinstatement. The labour court has considered that there was delay in raising an industrial dispute. The labour court has also considered that the workman was employed and has been earning. Mr. Parikh has submitted that the workman cannot be considered to have been gainfully employed during the intervening period. According to him, the workman was employed and was earning to some extent and, therefore, taking into consideration the delay aspect as well as the aspect of his earnings to some extent, the labour court ought to have granted some back wages and the labour court has not been justified in denying back wages for the whole period.

I have considered and examined these submissions made by Mr. Parikh. This aspect has been considered by the labour court in para 9 of the award in question. The workman was retrenched on 28th February, 1986 whereas he raised the industrial dispute which was referred for adjudication on 8th January, 1992, after about more than six years. This was one of the factors considered by the labour court while considering the aspect of back wages. There was evidence before the labour court vide Exh. 13 that since last four years, the respondent has been working in Hipolin and, therefore, the labour court has considered this aspect of employment of the respondent as well as the question of delay in raising the dispute and on the basis of these two considerations, the labour court has denied the back wages. The labour court has also considered one more aspect that the Gujarat Housing Board is a public body and more than 10,000 workmen are working with the Board and considering all these facts, the labour court thought it proper not to grant back wages but to grant an amount of Rs.5,000.00 to the workman. The another aspect was that the interim period

from the date of the termination till the date of award would be about ten years and the length of service of the respondent was about seven months or so. It is also required to be noted that if the workman would be having genuine grievance against the action of retrenchment, then, he would have immediately raised dispute. However, the workman waited upto 1992 and since he was not offered the job while other persons were recruited, has raised dispute. Thus, the workman was not vigilant about his right. Further, according to my opinion, the labour court has granted reinstatement on the technical ground of non compliance of section 25-G and H of the Industrial Disputes Act. Therefore, according to my opinion, the labour court has not committed any error in denying the back wages while passing the award of reinstatement in favour of the workman. Both the learned advocates were not able to point out any infirmity and/or jurisdictional error or procedural irregularity committed by the labour court while passing the award in question.

At this stage, it is also necessary to consider the powers of this Court in a petition under Article 226/227 of the Constitution of India. In case of Roahsn Deen versus Preetilal reported in (2002) 1 SCC 100, the apex court has observed as under in paragraph 12 of the report :

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measure to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to

erase such justice in the name of correcting the error of law."

Similarly, in case of M.S. Garewal and ANother versus Deep Chand Sood and Others reported in (2001) 8 SCC 151, the apex court has made the following observations in para 27 and 28 at page 167 :

"27. The decision of this Court in D.K. Bassu versus State of W.B. comes next. This decision has opened up a new vista in the jurisprudence of the country. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits stands extended since Anand,J. (as His Lordship then was) in no uncertain terms observed; (SCC p. 439 para 45)

'The Courts have the obligations to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to the life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim,who may have been the breadwinner of the family.'

28. Currently, judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affection of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact, the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of

expression firmly established the current trend of justice oriented approach. Law courts will lose their efficacy if they cannot possibly respond to the need of the society technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not. In para 6 of the said judgment, the apex court has observed as under:

"6. There can be little doubt that in an application under Article 227 of the Constitution, the High Court has to see whether the lower court/tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity; in other words, the Court is concerned not with the decision but with the decision making process. On this ground alone, the order of the High Court is liable to be set aside. "

Before parting with the judgment, it is proper to consider the observations or to keep in mind the observations made by the apex court in case of D.S. Nakara versus Union of India reported in 1983 (1) LLJ page 103, relevant paragraphs 14 and 15 are reproduced as under:

"14. We would like to point out that the philosophy of this Court as evolved in the cases we have referred to above is not that of the Court but is ingrained in the Constitution as one of the basis aspects and if there was any doubt on this there is no room for that after the Preamble has been amended and the Forty Second Amendment has declared the Republic to be a

socialistic one. The judgments therefore do nothing more than highlight one aspect of the constitutional philosophy and make an attempt to give the philosophy a reality of flesh and blood.

15. JAWAHARLAL NEHRU, the first Prime Minister of this Republic while dreaming of elevating the lot of the common man of this country once stated;

'Our final aim can only be a classic society with equal economic justice and opportunity to all, a society organized on a planned basis for the raising of mankind to hinger material and cultural levels. Everything that comes in the way will have to be removed gently, if possible, forcibly if necessary and there seems to be little doubt that coercion will often be necessary.'

These were his prophetic words about three decades back. More than a quarter of century has run out since he left us but there has yet been no percolation in adequate dose of the benefits the constitutional philosophy stands for to the lower strata of the society. TOLSTOY wrote;

'The abolition of slavery has gone on for a long time. Rome abolished slavery. America abolished it and we did but only the words were abolished, not the thing.'

Perhaps what Tolstoy wrote about abolition of slavery in a large sense applies to what we have done to the constitutional ethos. It has still remained on paper and is contained in the book. The benefits have not yet reached the common man. What SWAMI VIVEKANAND wrote in a different context may perhaps help a quicker implementation of the goal to bring about the overdue changes for transforming India in a positive way and in fulfilling the dreams of the Constitution fathers. These were the words of SWAMI VIVEKANANDA.

'It is imperative that all these various Yogas should be carried out in practice.Mere theories about them will not do any good. First, we have to hear

> about them; then we have to think about them. We have to reason the thouts out impress them on our minds and mediate on them; release them, until at last they become our whole lift. No longer will religion remain a bundle of ideas or theories or an intellectual assent; it will enter into our veryself. By means of an intellectual assent, we may today subscribe to many foolish things and change our minds altogather tomorrow. But true religion never changes. Religion is realization; not talk nor doctrine nor theories however beautiful day may be. It is being an becoming, not hearing or acknowledging. It is the whole souls' becoming changed into what it believes. That is religion."

In view of the above observations, the award made by the labour court in reference no. 190 of 1992 dated 7th March, 1996 is perfectly all right and it would not require any interference of this Court in exercise of the powers under Article 226 and/or 227 of the Constitution of India. Therefore, there is no substance in these two petitions and both are required to be rejected.

Therefore, in the result, both the petitions are dismissed. Rule in each of the petitions shall stand discharged with no order as to costs. Interim relief granted by this Court in Special Civil Application NO. 107 of 1997 is hereby vacated.

Learned advocate Mr. Parikh has submitted that the labour court has granted reinstatement under the award in question on 7th March, 1996 but the workman has yet not been reinstated in service since stay granted by this Court has been operating and, therefore, he has requested to issue some suitable directions to the Board for reinstating the award of reinstatement within some reasonable period.

Considering the submissions made by Mr. Parikh, it is directed to the petitioner Board to reinstate the respondent workman Sanjay B. Shah in service with effect from 7.3.1996 within two months from the date of receipt of copy of this order in terms of the award made by the labour court in Reference No. 190 of 1992 dated 7th March, 1996.

Dt. 3.5.2002. (H.K. Rathod,J.)
Vyas